

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

Number: **201204008**

Release Date: 1/27/2012

CC:PA:01:JABremer

POSTF-119738-11

UILC: 6511.00-00, 6511.03-02, 6511.03-03

date: October 21, 2011

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subject: CCA Request, POSTF-119738-11

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

Corporation A	=
Corporation B	=
Corporation C	=
Consolidated Filing Group	=
Year 1	=
Year 2	=
Year 3	=
Year 4	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Date 6	=
Date 7	=
Date 8	=
Due Date 1	=

Due Date 2	=
Assessment Date 1	=
Assessment Date 2	=
Amount 1	=
Amount 2	=
Amount 3	=

ISSUES

1. Whether taxpayer's claim for refund of a Year 1 overpayment is timely under Internal Revenue Code ("IRC") section 6511(d)(2)(A) where taxpayer elected in Year 4 to deduct rather than credit foreign taxes paid in Year 2, thereby generating an increased net operating loss carryback to Year 2.
2. Whether taxpayer's claim for refund of a Year 1 overpayment is timely under IRC section 6511(d)(3)(A) where taxpayer elected in Year 3 to deduct rather than credit foreign taxes paid in Year 2, thereby generating an increased net operating loss carryback to Year 2.

CONCLUSIONS

1. Taxpayer's refund claim for Year 1 is not timely under IRC section 6511(d)(2)(A) because taxpayer filed the refund claim more than three years after the due date (plus extensions) of the Year 2 return and more than six months after the assessment period for Year 2, as extended by agreement between taxpayer and the Internal Revenue Service (the "Service").
2. Taxpayer's refund claim for Year 1 is not timely under IRC section 6511(d)(3)(A) because the special ten-year period of limitations under that section does not apply. Taxpayer elected to deduct foreign taxes paid in Year 2, and thus no credit is allowed for such taxes.

FACTS

Taxpayer files Form 1120 on a calendar year basis for itself and its consolidated subsidiaries. On Date 1, taxpayer's foreign parent, Corporation A, acquired an unrelated foreign company, Corporation B. As part of the acquisition of Corporation B, Corporation A acquired its US entities, including Corporation C. Prior to the acquisition, Corporation C and its consolidated subsidiaries (Consolidated Filing Group) filed Form 1120 on a calendar year basis. After the acquisition, on Date 2, Corporation A transferred ownership of Consolidated Filing Group to taxpayer in exchange for Amount 1 note.

Taxpayer converted Consolidated Filing Group into an LLC on Date 2. Taxpayer filed Form 1120 for Consolidated Filing Group Year 3 taxable year on Date 3. Taxpayer filed

an additional Form 1120 for Consolidated Filing Group on Date 4 that covered the short period beginning Date 1 and ending Date 2. As of Date 2, Consolidated Filing Group was a disregarded entity for tax purposes and included as part of taxpayer's consolidated Form 1120.

Between June and October of Year 3, taxpayer filed amended returns (Forms 1120X) for Consolidated Filing Group for the calendar Year 2 through calendar Year 3 and the short period ending Date 2. Pursuant to Treasury Regulation section 1.901-1(d), on the amended returns taxpayer elected to change the previously claimed foreign tax credits to deductions for foreign taxes accrued in each year. On Date 5, taxpayer also filed a Form 1120X for Consolidated Filing Group's taxable Year 1 to reflect the carryback of an increased net operating loss in the amount of Amount 2 generated by the election on the Year 2 Form 1120X to deduct rather than credit foreign taxes accrued in that year. The increased net operating loss carryback to Year 1 gave rise to taxpayer's refund claim of Amount 3.

Consolidated Filing Group's original Year 2 return was due to be filed on Due Date 1. Consolidated Filing Group filed for an automatic six-month extension for corporate income tax returns and the due date was extended to Due Date 2. The assessment period was also automatically extended for six months; the assessment period for Consolidated Filing Group's Year 2 tax return ended on Assessment Date 1. On Date 6, pursuant to an agreement between Consolidated Filing Group and the Service as reflected on Form 872, the assessment period was extended to Assessment Date 2.

LAW AND ANALYSIS

IRC section 901(a) provides that if a taxpayer chooses the benefits of the foreign tax credit, the taxpayer's income tax shall, subject to the limitation of IRC section 904, be credited with the amounts allowed under IRC section 901(b) plus, in the case of a corporation, the taxes deemed to have been paid under IRC sections 902 and 960. Such choice for any taxable year may be made or changed at any time before the expiration of the period prescribed for making a claim for credit or refund of the income tax for such taxable year.

Treasury Regulation section 1.901-1(d) provides that, for a particular year, a taxpayer may claim the benefits of IRC section 901 (or claim a deduction in lieu of a foreign tax credit) at any time before the expiration of the period prescribed by IRC section 6511(d)(3)(A) (or section 6511(c) if the period is extended by agreement).

IRC section 6501(a) provides that, in general, the amount of any income tax owed shall be assessed within three years after the return was filed. IRC section 6501(c)(5) provides an exception to IRC section 6501(a), where the adjustment of certain taxes allowed as a credit against income taxes results in additional U.S. tax due. See IRC section 905(c).

IRC section 6511(a) provides that a claim for credit or refund of an overpayment of any income tax in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later.

IRC section 6511(d)(2)(A) provides that if a claim for credit or refund relates to an overpayment attributable to a net operating loss carryback, in lieu of the three-year period of limitations prescribed in IRC section 6511(a), the period of limitations shall be that period which ends three years after the time prescribed by law for filing the return (including extensions thereof) for the taxable year of the net operating loss which results in such carryback, or the period prescribed in IRC section 6511(c) in respect of such taxable year, whichever is later.

IRC section 6511(d)(3)(A) provides that if a claim for credit or refund relates to an overpayment attributable to any taxes paid or accrued to any foreign country for which credit is allowed against U.S. income tax in accordance with the provisions of section 901, in lieu of the three-year period of limitations prescribed in IRC section 6511(a), the period of limitations shall be ten years from the date prescribed by law for filing the return for the year in which the foreign taxes were actually paid or accrued.

Treasury Regulation section 301.6511(d)-3(a) provides that, in the case of an overpayment of income tax resulting from a credit allowed under the provisions of section 901 for taxes paid or accrued to a foreign country or possession of the United States, a claim for credit or refund must be filed by the taxpayer within ten years from the last date prescribed for filing the return (determined without regard to any extensions of time for filing such return) for the taxable year with respect to which the claim is made. (This regulation does not reflect a 1997 amendment to IRC section 6511(d)(3)(A) that clarified that the year with respect to which the claim is made is considered to be the year in which the foreign taxes were paid or accrued, rather than the year to which such taxes are carried and claimed as a credit, giving rise to a refund claim.) Such ten-year period shall be applied in lieu of the three-year period prescribed in IRC section 6511(a).

ISSUE 1:

You have asked whether the taxpayer's refund claim is timely under IRC section 6511(d)(2)(A). IRC section 6511(d)(2)(A) provides that if a claim for credit or refund relates to an overpayment attributable to a net operating loss carryback, in lieu of the three-year period of limitations prescribed in IRC section 6511(a), the period of limitation shall be that period which ends three years after the time prescribed by law for filing the return (including extensions thereof) for the taxable year of the net operating loss which results in such carryback, or the period prescribed in IRC section 6511(c) in respect of such taxable year, whichever is later.

Taxpayer's refund claim, filed on Date 5, related to an overpayment of tax attributable to a net operating loss carryback from the Year 2 source year to Year 1.¹ Taxpayer's Year 2 return was due to be filed on Due Date 2 (due date including extensions). Therefore, to be timely under IRC section 6511(d)(2)(A), taxpayer would have had to file the refund claim prior to or on Date 7. Taxpayer did not file a refund claim until Date 5.

In addition, taxpayer and the Service agreed to extend the assessment period for taxpayer's Year 2 taxable year until Assessment Date 2. Pursuant to an agreement under IRC section 6501(c), the period of limitations on a refund claim does not expire before six months after the expiration of the period within which an assessment can be made under the agreement. The period of limitations for claiming a refund pursuant to IRC section 6501(c) thus expired on Date 6, six months after the assessment period extended by agreement until Assessment Date 2. Taxpayer filed its refund claim on Date 5, more than two years after the agreed extended assessment period.

ISSUE 2:

You also have asked if taxpayer's refund claim is timely under IRC section 6511(d)(3)(A), which provides a special ten-year period of limitations on refund claims in certain circumstances. That section provides:

(3) SPECIAL RULES RELATING TO FOREIGN TAX CREDIT.--

(A) SPECIAL PERIOD OF LIMITATION WITH RESPECT TO FOREIGN TAXES PAID OR ACCRUED.--If the claim for credit or refund relates to an overpayment attributable to any taxes paid or accrued to any foreign country or to any possession of the United States *for which credit is allowed* against the tax imposed by subtitle A in accordance with the provisions of section 901 or the provisions of any treaty to which the United States is a party, in lieu of the 3-year period of limitation prescribed in subsection (a), the period shall be 10 years from the date prescribed by law for filing the return for the year in which such taxes were actually paid or accrued.

IRC section 6511(d)(3)(A) (emphasis added). Thus, pursuant to the plain language of IRC section 6511(d)(3)(A), the special ten-year period of limitations only applies if the claim for refund or credit relates to an overpayment attributable to any taxes paid or accrued for which credit is *allowed* against U.S. income tax under section 901. Because taxpayer filed an amended return for the taxable Year 2 in which it elected to

¹ For taxable years ending in 2001 and 2002, taxpayers that ordinarily carried a net operating loss back two years had to carry the loss back five years unless they elected out of the requirement. Pre-ARRTA IRC section 172(b)(1)(H), P.L. 111-5 § 1211(a) (2009). Taxpayer did not elect out of the five-year net operating loss carryback requirement.

claim a deduction with respect to the foreign taxes paid or accrued in that year, a foreign tax credit for foreign taxes paid or accrued in Year 2 is no longer allowed.

The distinction between an “allowed” credit and an “allowable” credit is an important one. The term “allowable” is defined as “that which may be allowed, legitimate, permissible.” Random House Dictionary, Random House, Inc. 2011. The term “allowed,” on the other hand, is defined as that which is permitted. *Id.* IRC section 164(a)(3) provides that a deduction is allowed for the taxable year within which foreign income, war profits, and excess profits taxes are paid or accrued. However, IRC section 275(a)(4), Treasury Regulation section 1.164-2(d), and Treasury Regulation section 1.901-1(c) provide that no deduction is allowed for income, war profits, and excess profits taxes imposed by the authority of any foreign country or possession of the United States, if the taxpayer chooses to take to any extent the benefits of IRC section 901, relating to the credit for taxes of foreign countries and U.S. possessions. Conversely, Treasury Regulation section 1.901-1(h) denies the credit under IRC section 901 to any taxpayer who, for a particular taxable year, elects to deduct taxes paid or accrued to any foreign country or U.S. possession.

Under IRC section 275(a)(4) and the regulations under IRC sections 164 and 901, a deduction for foreign taxes paid or accrued is allowable unless and until the foreign tax credit has been claimed with respect to such taxes. Once a credit is taken, such deduction is not allowed. Similarly, a foreign tax credit is allowable for such taxes unless and until a deduction has been claimed with respect to such taxable year, at which point the credit is not allowed.

This interpretation is supported by Treasury Regulation section 301.6511(d)-3(a), which specifically states that the special ten-year limitations period applies only to an overpayment of income tax for which a claim for credit or refund is made, where the overpayment results “from a *credit, allowed under the provisions of section 901 ... for taxes paid or accrued to a foreign country or possession of the United States.*” (Emphasis added.) No provision is made under the regulations for an extended statute of limitations where the claim for credit or refund results from a deduction of foreign income taxes. Therefore, under the plain language of the regulation as well as the statute, the special ten-year period of limitations under IRC section 6511(d)(3)(A) is not applicable to taxpayer’s claim for refund.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

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Please call (202) 622-4910 if you have any further questions.